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DAVID JENNINGS, ET AL.,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* MEMBERS OF ASIAN AMERICANS ADVANCING JUSTICE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

This brief is submitted by all members of Asian Americans Advancing Justice (Advancing Justice), the national affiliation of five nonprofit, nonpartisan civil rights organizations: Asian Americans Advancing Justice – AAJC, Asian Americans Advancing Justice – Asian Law Caucus, Asian Americans Advancing Justice – Atlanta, Asian Americans Advancing Justice – Chicago, and Asian Americans Advancing Justice – Los Angeles. Members of Advancing Justice routinely file *amicus curiae* briefs in cases in this Court and other courts. Through direct services, impact litigation, policy advocacy, leadership development, and capacity building, the Advancing Justice affiliates advocate for marginalized members of the Asian American, Native Hawaiian, Pacific Islander and other underserved communities, including immigrant members of those communities.

Asian Americans and Pacific Islanders (AAPI) have a strong interest in this case in light of their long and troubled experience with our immigration system. Much of modern immigration legal doctrine relies on cases concerning racist laws that were enacted over a century ago specifically to exclude AAPI immigrants. Today, segments of the AAPI community remain disproportionately represented in immigration detention and, in turn, bear a significant share of the physical and emotional harms that flow from it, together with

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. All parties have filed with the Clerk a letter of blanket consent to the filing of briefs of amici curiae.

other immigrant communities. The length of immigration detention today, especially when considered with the conditions that detainees typically experience, renders immigration policies effectively punitive for many detainees. And this harm extends to the families and communities from which these detainees are plucked, destabilizing households and causing lasting psychological suffering for children. This experience—of detainees, families, and society as a whole—provides important historical and contemporary context in this case.

SUMMARY OF ARGUMENT

Amici write to place in context the Government's deeply troubling argument that the "plenary power" doctrine justifies minimal constitutional scrutiny of immigration detention. The plenary power doctrine was born as a means to rationalize racist laws excluding AAPIs from this country. It effectuated the Government's widespread reduction of individual immigrants to pernicious stereotypes, particularly as threats to public safety. This sort of generalizing about immigrants—which the Government again employs in this case, echoing the justifications offered for Chinese exclusion and Japanese American internment—is one of the very harms that the individualized custody hearings at issue here are designed to prevent. The Court should pause before extending the plenary power doctrine particularly where, as here, the authority the Government seeks will once again significantly affect AAPI and other immigrant communities who have been demonized in public discourse.

Viewed in context, the plenary power doctrine has no relevance to this case. The doctrine is best under-

stood to do no more than limit constitutional scrutiny over the Government's power to exclude and deport noncitizens. The small handful of decisions that invoke plenary power outside the context of exclusion and deportation do not support the much broader notion that the Government may deprive noncitizens in immigration detention of the baseline liberty protections afforded to all persons by the Due Process Clause. Because the Due Process Clause protects "persons," citizens and noncitizens in civil detention are equally entitled to its liberty protections. The Government asks, in essence, for the Court to ignore that basic truth, and extend the plenary power doctrine because of amorphous and unsubstantiated concerns about public safety. But there is no legal basis to detain the immigrants in this case based on dangerousness. The Government's appeal to public safety in this context is based on the xenophobic—and empirically false—notion that immigrants are inherently more dangerous than citizens. It should be rejected.

To the extent that the plenary power doctrine limits the irreducible liberty protections afforded to persons in immigration detention, it should be relegated to the ash heap of history, alongside other racist doctrines handed down by the Fuller Court. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896). The doctrine has never outgrown its racist origins. Modern cases simply reiterate the old rationalizations offered for excluding AAPI immigrants, even as those rationalizations have grown steadily more indefensible. If Congress were to enact a law today that excluded all AAPI immigrants in the name of preserving a distorted vision of racial purity, it is hard to imagine this Court would uphold such a law under the plenary power doctrine. The Court should not sanction the

continued use of a doctrine that was first employed to achieve just that result. Eschewing plenary power, moreover, would leave Congress with ample authority to make immigration law. Congress simply would be required, in the immigration context as elsewhere, to exercise its authority consistent with the liberty interests protected by the Due Process Clause.

ARGUMENT

The Government contends that it may deprive immigration detainees of their liberty in ways that would unquestionably violate the Due Process Clause but for the detainees' lack of citizenship. In particular, the Government contends (1) that it has "plenary authority over immigration and the exclusion or expulsion of aliens," Pet. Br. at 53, (2) that this authority justifies subjecting noncitizens to "rules that would be unacceptable if applied to citizens," *id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)), and (3) that deprivations of liberty that would violate the Due Process Clause as applied to citizens may permissibly be applied to noncitizens, *id.* at 54 (citing *Fiallo v. Bell*, 430 U.S. 787 (1977)). This argument, which permeates the Government's brief, *see e.g.*, *id.* at 11, 14, 21, 25, 53, rests not on principle but on a legacy of racism. It cannot bear the constitutional weight the Government places upon it.

I. *The Plenary Power Doctrine is Rooted in Racism Against AAPI Immigrants*

The Government invokes several decisions to support its reliance on the plenary power doctrine. *See* Pet. Br. at 19, 20, 27, 53, 54 (citing *Demore v. Kim*, 538 U.S. 510 (2003); *Reno v. Flores*, 507 U.S. 292 (1993); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Shaughnessy v. United*

States ex rel. Mezei, 345 U.S. 206 (1953) ("*Mezei*"); *Carlson v. Landon*, 342 U.S. 524 (1952); and *Knauff v. Shaughnessy*, 338 U.S. 537 (1950) ("*Knauff*")).

These cases are built from an anachronistic foundation of racial animus and xenophobia directed toward AAPI immigrants. For the first hundred or so years of this country's history, the federal government imposed no restrictions on immigration. Ting, *"Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 Temp. Pol. & Civ. Rts. L. Rev. 301, 302 (1995). But when Chinese immigration began to increase, Congress reassessed this policy, propelled by fierce and often violent public reactions to Chinese immigrants. *Id.* Shortly after the Civil War, Congress began passing a series of laws closing the country's borders to Chinese immigrants. The first such law, the Page Law of 1875, prohibited entry of Chinese immigrants deemed "undesirable," namely convicts and prostitutes. Act of March 3, 1875, ch. 141, 18 Stat. 477. A few years later, in the Chinese Exclusion Act of 1882, Congress extended this prohibition to all new immigrants from China. Pub. L. No. 47-126, 22 Stat. 58. Chinese exclusion remained in effect for sixty years, until it was finally repealed during World War II. Pub. L. No. 78-199, 57 Stat. 600 (1943).

The legislative history of the Chinese Exclusion Act made its racism plain. For instance, Senator Henry M. Teller of Colorado defended the law as follows: "The Caucasian race has a right, considering its superiority of intellectual force and mental vigor, to look down upon every other branch of the human family . . . . We are the superior race today. We are superior to the Chinese." 13 Cong. Rec. 1645, 1645

(1882). Likewise, Senator John Franklin Miller of California warned that "[t]he presence of an inferior race either inevitably expels the superior race or reduces it to the ways, modes of life, and all the other conditions of the new-comers." *Id.* at 1744; *see also id.* at 1978 (statement of Rep. Cassidy) ("We religiously believe that unrestricted Mongolian immigration means ultimate destruction."); *id.* at 2031 (statement of Rep. Brumm) ("The Chinaman is neither socially, morally, nor politically fit to assimilate with us."). There is no historical dispute that Chinese exclusion was the product of a virulent mix of "nativism, racism, and xenophobia." Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 855 (1987). Much of this anti-Chinese animosity was "rooted in fear of both the competition Chinese men posed to white labor, and of the regenerative and polluting power of Chinese women." Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641, 664 (2005).

Congress extended the scope of Chinese exclusion still further in 1888 in the Scott Act. Under the Act, Chinese exclusion applied to virtually "all persons of the Chinese race," including such persons who had once legally resided in the United States. Act of October 1, 1888, ch. 1064, 25 Stat. 504. The Act did not require deportation of Chinese immigrants present in the country, but provided that such immigrants who traveled outside the country would not be permitted to return. *Id.*[2]

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[2] The Scott Act made exceptions for Chinese government officials, teachers, students, tourists, and merchants.

The plenary power doctrine emerged as an affirmation and rationalization of these racist laws. The doctrine is typically traced to *Chae Chan Ping v. United States*, often cited simply as the *Chinese Exclusion Case*, which upheld the constitutionality of the Chinese Exclusion Act of 1882. 130 U.S. 581 (1889). The petitioner in *Chae Chan Ping*, a Chinese immigrant who had obtained a certificate of identity proving his legal residence in the United States, traveled to China in 1887 and, upon his return to the United States, was refused reentry under the Scott Act of 1888. The Court rejected the petitioner's argument that his exclusion was unconstitutional, reasoning that it was "not . . . open to controversy" that the federal government could "exclude aliens from its territory." *Id.* at 603. The Court explained that "[j]urisdiction over its own territory to that extent is an incident of every independent nation," and that if the federal government could not exclude noncitizens, "it would be to that extent subject to the control of another power." *Id.* *Chae Chan Ping* thus effectively afforded Congress *carte blanche* to exclude noncitizens, including on grounds of racism.

Chae Chan Ping's progeny further cleared the constitutional path for racist immigration laws concerning admission and deportation of noncitizens. In *Nishimura Ekiu v. United States*, the Court held that immigrants denied admission could not challenge their exclusion on due process grounds, reasoning that "the decisions of the executive officers, acting within powers expressly conferred by congress, are due process of law." 142 U.S. 651, 659 (1892). The following year, in *Fong Yue Ting v. United States*, the Court extended this seemingly unbridled power over exclusion of noncitizens to laws regarding deportation. 149 U.S. 698 (1893). It held: "The right of a

nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country . . . is as absolute and unqualified as the right to prevent their entrance into the country." *Id.* at 707; *but see Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100-101 (1903) (limiting *Fong Yue Ting* by holding that Congress nevertheless could not "disregard the fundamental principles that inhere in 'due process of law'" in deportation).

These decisions gave the Court's imprimatur to a steady stream of racist and exclusionary immigration laws and policies directed toward AAPIs. The Chinese Exclusion Act of 1882, initially effective for only a ten-year period, was renewed in 1892 and made permanent in 1902. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1, 37 (1998). Against this backdrop, immigration law and policies continued to evolve primarily to exclude immigrants from other Asian countries. For instance, when immigrants from Japan began to arrive in the United States in significant numbers, the two countries entered the Gentleman's Agreement of 1907-1908, which provided that Japan would not issue documents for travel to the United States. *See id.* at 13. In 1917, as immigration from India and Southeast Asia began to grow, Congress extended immigration exclusions to all races indigenous to the "Asiatic Barred Zone," which it defined to include nearly all of Central and Southeast Asia. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 876; *see also* Senate Judiciary Comm., The Immigration and Naturalization Systems of the United States, S. Rep. No. 81-1515, at 67

(1950).[3] Notably, Congress excepted from this exclusion all "white persons born in the zone." *Id.*

These exclusionary laws were consolidated in the Immigration Act of 1924. Under the Act, "aliens ineligible to citizenship" were denied admission to the country. Immigration Act of 1924, ch. 190, 43 Stat. 153, 168. "This phrase was a euphemism for [AAPIs] because the act defined an alien 'ineligible to citizenship' as one covered by the Chinese Exclusion Act or racially ineligible to naturalize." Chin, *supra*, at 13-14. Following the law, nearly all AAPIs were barred from immigrating to the United States, and even AAPI immigrants lawfully present in the United States were barred from becoming U.S. citizens. *Id.* at 14. These exclusions were explicitly racial in nature: even if a person of Chinese descent sought to immigrate to the United States from a country subject to no comparable exclusion, the racial exclusion would apply to that person. *Id.*

The racism against AAPIs reflected and reinforced by these exclusion and deportation laws permeated into the detention context as well, in what is widely accepted as a stain on our constitutional jurisprudence. During World War II, the federal government forcibly interned Japanese Americans following the attack on Pearl Harbor. The chief architects of internment did not conceal their racism. General John DeWitt, the Commander of the Western Defense, made the case for internment to Secretary of War

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[3] The zone "include[d] the East Indies, western China, French Indochina, Siam, Burma, India, Bhutan, Nepal, eastern Afghanistan, Turkestan, the Kirghiz Steppe, and the southeastern portion of the Arabian Peninsula." S. Rep. No. 81-1515, at 67.

Henry Stimson in transparently racial terms: "In the war in which we are now engaged, racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil have become 'Americanized,' the racial strains are undiluted." Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied 6 (1997). Stimson assessed internment through the same racial lens; shortly before President Roosevelt authorized internment, Stimson wrote in his diary that "the racial characteristics [of U.S.-born Japanese Americans] are such that we cannot understand or trust even the citizen Japanese." Daniels, *The Japanese American Incarceration Revisited: 1941-2010*, 18 Asian Am. L.J. 133, 134 (2011).

General DeWitt made the same racist case for Japanese American internment before Congress, distinguishing it from treatment of European immigrants from other enemy nations. He explained that "[t]he danger of the Japanese was, and is now,—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty." Personal Justice Denied, *supra*, at 66. Asked why persons of Japanese heritage should be treated differently from those of Italian and German heritage, General DeWitt replied: "You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map." *Id.* In line with General DeWitt's thinking, "[t]here were no serious proposals for the mass movement of categories of American citizens of German and Italian descent." *Id.* at 286.

As early as 1948, Congress conceded that "there was recorded during [World War II] not one act of sabotage or espionage attributable to those who were the victims of the forced relocation." *Id.* at 50. This widespread reduction of individuals to erroneous mass generalization is not merely a stain of history; it is one of the very harms that the individualized custody hearings at issue here are designed to prevent.

Only after the United States allied with China during World War II did Congress begin to repeal its exclusions of AAPI immigrants. Ting, *supra*, at 305. Even then, direct discrimination against AAPIs persisted in federal immigration policy into the 1960s. Although immigration from China was allowed, for instance, the strictest possible quota applied: only 100 persons were admitted each year. *Id.* This quota, like the Immigration Act of 1924, operated based on race, not national origin: only 100 persons of Chinese descent were allowed in the country each year, whether or not they were born in China. *Id.* Similar quotas applied to other AAPI immigrants. *Id.* When these quotas were abolished in 1965, it was only amidst assurances that immigration patterns were not expected to change significantly. *Id.* at 307.

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Unfortunately, the letter of the law remains stained by this legacy even today. One branch of this legacy is, of course, this Court's response to Japanese American internment in *Korematsu v. United States*, 323 U.S. 214 (1944). *Korematsu* is a decision that, while not formally overruled, has been rejected "in the court of history," *see* Tribe, American Constitutional Law 237 n.118 (3d ed. 2000). But whereas *Korematsu* has become something of a cautionary tale, *e.g.* Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 422

(2011) (identifying the "anticanon" of constitutional law as including *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Lochner v. New York*, and *Korematsu*), the plenary power doctrine—born of the same racist animus—remains very much alive, including as support cited by the Government here. This legacy should counsel for serious pause before extending the doctrine further, particularly in this case where the authority the Government seeks will once again disproportionately affect AAPI and other immigrant communities who have been demonized in public discourse.

II. *The Plenary Power Doctrine Should Not Be Extended Beyond Exclusion and Deportation to Civil Detention of Noncitizens*

The Government's argument for extending the plenary power doctrine to this case relies heavily on language enunciated in *Mathews* and now running through several of the Court's decisions, including *Demore*: "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." Pet. Br. at 53; *Mathews*, 426 U.S. at 79-80; *see also Demore*, 538 U.S. at 521 (quoting *Mathews*). This statement is, of course, a truism: Virtually all of immigration law involves the exercise of powers that Congress could not employ as to citizens. But the Government invokes these words to suggest something more—that Congress may operate largely free from constitutional constraint in the immigration arena. This suggestion would extend plenary power beyond its doctrinal moorings and should be rejected.

Since its inception, the plenary power doctrine has concerned the power to exclude and deport nonciti-

zens. This power, broad as it may be, is critically a power over the flow of immigration, not over the physical liberty of immigrants held in custody. It thus has no bearing at all on what is at issue in this case: civil detention. This is not to say that the Government may not detain noncitizens in order to implement the immigration laws, just as it may detain citizens in other civil detention contexts. Rather, as "persons," noncitizens in civil detention are entitled to the same due process protections as citizens in analogous contexts, including individualized custody hearings.

This is apparent from a brief review of the doctrinal history. In the decades following *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting*, the Court steadily invoked those decisions for the proposition that the federal government has plenary power over exclusion and expulsion of noncitizens. *E.g. United States ex rel. Turner v. Williams*, 194 U.S. 279, 289-90 (1904) (exclusion and expulsion); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (exclusion); *Ng Fung Ho v. White*, 259 U.S. 276, 280 (1922) (expulsion); *Mahler v. Eby*, 264 U.S. 32, 40 (1924) (expulsion). The Court also approved "detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion," so long as such detention or confinement was nonpunitive. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896). But nowhere did these decisions hold that the Government has plenary authority to minimize the constitutional liberty interest to be free from detention that applies to all persons under the Due Process Clause. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding the Due Process Clause applicable to "all persons," including noncitizens).

In *Zadvydas v. Davis*, citing *Wong Wing*, this Court recognized that noncitizens have important liberty interests in avoiding immigration-related detention. 533 U.S. 678, 694 (2001). There, as here, the Government had argued that, in the context of civil detention of noncitizens, courts "must defer to Executive and Legislative Branch decisionmaking" pursuant to "cases holding that Congress has 'plenary power' to create immigration law." *Id.* at 695. The Court rejected this view, explaining that the plenary power doctrine is "subject to important constitutional limitations," *id.*, including the Due Process Clause, which "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent," *id.* at 683; *see also id.* at 695 (noting that *Zadvydas* did not "require [the Court] to consider the political branches' authority to control entry into the United States," as opposed to their authority to infringe on physical liberty).

In *Demore*, the Court recognized this principle, noting that "[i]t is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings." 538 U.S. at 523. But *Demore* nonetheless relied on the plenary power doctrine in concluding that noncitizens subject to civil detention are entitled to lesser due process protections than citizens. It cited a series of plenary power decisions invoked by the Government in this case, including *Mathews*, *Flores*, and *Carlson*. *Id.* at 521-26.

None of these three decisions should be read to establish that plenary power is relevant to civil detention. *Mathews* does not support the view that Congress's power to distinguish between citizens and noncitizens has any bearing on the dictates of due process in civil detention. The plaintiffs in *Mathews*

claimed that all noncitizens—rather than only noncitizens who had resided in the country for more than five years—should be afforded Medicare benefits equal to those received by citizens. 426 U.S. at 69. The Court rejected this claim, holding that "the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens." *Id.* at 80. It reasoned that the federal government's decision to confer such "munificence," could properly consider the length and character of the relationship between a noncitizen and the country. *Id.* The distinction between citizens and noncitizens drawn in *Mathews* likely could have been upheld under the standard of review applicable in federal equal protection cases from other contexts. In any event, *Mathews* did not hold that Congress could reduce the baseline due process rights afforded to all persons when physical liberty is at issue.

Flores also does not support a contrary view. *Flores* did not involve a mandatory detention scheme; it addressed the unique circumstances that arise with detention of *juveniles*. 507 U.S. at 302-05. It held that "freedom from physical restraint" was "not at issue" in the case because children are always in some form of physical custody. *Id.* at 302. *Flores* went on to say that the plenary power doctrine provided an alternative ground to uphold the statute at issue in the case insofar as the statute applied to noncitizens. *Id.* at 305-06. In so stating, *Flores* quoted *Mathews* for the proposition that "Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* (quoting *Mathews*, 426 U.S. at 79-80); *see also Demore*, 538 U.S. at 522 (quoting this language from *Flores*, in addition to quoting it from *Mathews*). To the extent that this alternative holding in *Flores* meant to suggest that *Mathews* allowed Congress to

ignore the due process requirements afforded all persons with respect to physical liberty, it was clearly mistaken: *Mathews* held no such thing. That Congress has even broad power to exclude and deport noncitizens or, as *Mathews* held, provide them varying levels of immigration benefits, does not mean it can detain them without providing the due process rights afforded all persons.

Nor should this Court rely on *Carlson* to hold that the plenary power doctrine alters the irreducible protections of the Due Process Clause in the civil detention context. In *Carlson*, four noncitizen communists brought habeas petitions challenging, among other things, the Attorney General's authority to confine them without bail during the pendency of deportation proceedings. The Court invoked a long line of plenary power decisions for the proposition that "[t]he power to expel [noncitizens]" was "essentially a power of the political branches," albeit one subject to "judicial intervention under the 'paramount law of the constitution.'" 342 U.S. at 537 (citing *Fong Yue Ting*, *Nishimura Ekiu*, and *Kaoru Yamataya*). The Court then held, however, that there is no denial of due process "where there is reasonable apprehension of hurt from [noncitizens] charged with a philosophy of violence against this Government." *Id.* at 542. The Court's finding of a "reasonable apprehension of hurt" based upon demonstration of a "philosophy of violence" in *Carlson* distinguishes it from this case, where the Government does not and cannot justify such an assumption as to the varied types of immigrants who are detained here. More importantly, *Carlson* gave no justification for this aspect of its holding. The only authority *Carlson* cited was *Knauff*, an exclusion case that did not address the due process rights afforded to persons in civil detention. *Id.*

Finally, the Government's reliance on *Mezei* is similarly misplaced. *Mezei* is primarily an exclusion case: relying on the plenary power doctrine, the Court upheld the Government's authority to exclude a noncitizen harbored on Ellis Island. 345 U.S. at 212; *see also id.* at 213 (describing the case as "an exclusion proceeding"). As the Government emphasizes, *Mezei* also suggested that noncitizens denied admission have no due process rights aside from those granted by Congress. *See* Pet. Br. at 19. Whatever the merits of this suggestion as to the facts in *Mezei*—which involved the "continued exclusion," 345 U.S. at 215, of someone who had lost the right to live in the United States and could not be repatriated because no other country would take him—it should not be read to support the general proposition that noncitizens as a general matter have lesser liberty interests in "freedom from imprisonment." *Zadvydas*, 533 U.S. at 690.

Because the Due Process Clause protects "persons," citizens and noncitizens in civil detention are equally entitled to its liberty protections. The Government asks, in essence, for the Court to ignore that basic truth, and extend the plenary power doctrine to civil detention because of concerns about public safety. But there is no legal basis to detain the immigrants in this case based on dangerousness. Many of them have no criminal history, and those that do have served their sentences. The appeal to public safety in this context is based on the xenophobic—and empirically false—notion that immigrants are inherently more dangerous than citizens. *See, e.g.*, Jason L. Riley, *The Mythical Connection Between Immigrants and Crime*, Wall St. J. (July 14, 2015), http://www.wsj.com/articles/the-mythical-connection-between-immigrants-and-crime-1436916798 (collecting sources). Indeed, the Government's appeal to

public safety is comprised of the same hollow justifications used to rationalize incarcerating immigrants in the past. It should be rejected.

III. *Built on Racism and Exclusion, the Plenary Power Doctrine Should be Discarded*

Even if the plenary power doctrine did apply to immigration detention, the Court should not rely on it because the doctrine belongs in the ash heap of history alongside other racist doctrines handed down by the Fuller Court. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. at 552 (upholding "separate but equal" accommodations); *Ex parte Lockwood*, 154 U.S. 116 (1894) (upholding exclusion of female lawyers from the Virginia bar); *Davis v. Beason*, 133 U.S. 333 (1890) (upholding conviction of Mormon for attempting to vote). The doctrine has never outgrown its racist origins.

Scholars have singled out the plenary power doctrine "for the sharpest criticism," Henkin, *supra*, at 858, and have "argued forcefully for years that [the doctrine] should be reexamined or abolished," Chin, *supra*, at 7-8. In short, the doctrine "has no foundation in principle. It is a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects." Henkin, *supra*, at 862.

A close look at the cases invoked by the Government illustrates the fossilized nature of the doctrine. As described above, the Court's initial decisions on plenary power invoked conclusory notions of national sovereignty to justify racism against AAPIs. In the years since, the Court's invocations of plenary power have simply reiterated the flawed and unprincipled claims of those initial cases, even as their flaws have grown more and more apparent.

The normalization of the racist underpinnings of the plenary power doctrine is particularly clear in a series of decisions following World War II. For instance, in 1950, the Court upheld the exclusion of a noncitizen based on a determination by the Attorney General that "her admission would be prejudicial to the interests of the United States." *Knauff*, 338 U.S. at 539-40. Citing *Nishimura Ekiu* and *Fong Yue Ting*, the Court observed: "Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 543. It added, again citing *Nishimura Ekiu*: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 544.

In decisions over the next several years, the Court repeatedly affirmed the plenary power doctrine based purely on the legacy of its decisions upholding Chinese exclusion. In *Carlson*, the Court stated that the plenary power doctrine was "not questioned and require[d] no reexamination," citing *Nishimura Ekiu* and *Fong Yue Ting*. 342 U.S. at 534. Likewise, *Mezei* grounded the plenary power doctrine in *Chae Chan Ping* and *Fong Yue Ting* as well as the Court's decision in *Knauff* from a few years previously. 345 U.S. at 210. The following Term, the Court acknowledged the dangers of leaving the plenary doctrine unexamined, noting that "[i]n light of the expansion of the concept of substantive due process as a limitation upon all powers of congress, even the war power, . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as

belonging to Congress in regulating the entry and deportation of [noncitizens]." *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (citation omitted). But the Court concluded that "the slate is not clean," observing that "there is not merely 'a page of history,' but a whole volume." *Id.* at 531 (citation omitted). That this volume of history is a volume inscribed with racism and exclusion received no comment, but was implicit.

Chinese exclusion also remains close beneath the surface—if not on the surface—of the Court's more recent affirmations of the plenary power doctrine. For instance, the Government invokes *Fiallo v. Bell* for the proposition that the Court "'ha[s] long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" 430 U.S. at 792 (quoting *Mezei*, 345 U.S. at 210); Pet. Br. at 19. In support of this proposition, *Fiallo* cited *Fong Yue Ting* and *Chae Chan Ping*. The Court's distinction between citizens and noncitizens in *Mathews*, see Pet. Br. at 53, likewise was built on an artifice of Chinese exclusion cases. *Mathews* cited *Galvan* and a pair of other decisions: *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). *Kleindienst* and *Harisiades*, in turn, rested their assertions of plenary power on *Chae Chan Ping* and *Fong Yue Ting*. *See Kleindienst*, 408 U.S. at 765 (citing *Chae Chan Ping* and *Fong Yue Ting*); *Harisiades*, 341 U.S. at 586 (citing *Fong Yue Ting*). The plenary power discussions in *Flores* and *Demore* invoked the same artifice of decisions built on *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting*. *See Flores*, 507 U.S. at 305-06 (citing *Mathews*, *Fiallo*, and *Carlson*); *Demore*, 538 U.S. at 521-22 (citing *Flores*, *Mathews*, *Fiallo*, *Carlson*, and *Harisiades*).

The failure to take stock of the origins of the plenary power doctrine has grown only more glaring with time. When *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting* were decided, "the Bill of Rights had not yet become our national hallmark and the principal justification and preoccupation of judicial review. It was an era before United States commitment to international human rights; before enlightenment in and out of the United States brought an end both to official racial discrimination at home and to national-origins immigration laws." Henkin, *supra,* at 862-63. If Congress were to pass a law excluding all AAPI immigrants today in the name of preserving a distorted vision of racial purity, it is hard to imagine that this Court would uphold such a law as within the federal government's plenary power. Yet the Court persists in accepting the doctrine that was crafted to achieve that indefensible result.

Discarding the plenary power doctrine would not require discarding the truism that Congress may make laws applying to noncitizens—like exclusion and deportation laws—that Congress could not apply to citizens. It would simply require that immigration laws, like all laws of this country, be subject to otherwise-applicable constitutional constraints, including appropriate judicial review to ensure compliance with the Constitution's demands. Here, the relevant constitutional constraints are those imposed by the Due Process Clause regarding deprivations of physical liberty. The Court should not ignore, in the context of immigration detention, the due process protections that are and should be applicable to all persons. There is no defensible justification for such a rule.

CONCLUSION

For the above reasons, the Court should analyze the immigration detention scheme at issue here in accordance with the due process requirements that attach to all other forms of civil detention, and not under the plenary power doctrine, which is both irrelevant and illegitimate. The detentions at issue here that deprive immigrants of individualized custody review are plainly unlawful as measured against those due process standards. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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